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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 544

ARROW TRANSPORTATION COMPANY, ET AL., APPELLANTS

v.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, ET AL., APPELLEES

No. 545

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

MEMORANDUM FOR THE UNITED STATES

The United States was a statutory defendant in the court below, pursuant to 28 U.S.C. 2322. However, we took the position that the Commission's order cancelling Southern's reduced rates for multiple-car movements of grain in jumbo hopper cars was erroneous. Specifically, we urged that the Commission's ruling that the rates violated Section 3(1) of the

Interstate Commerce Act was based upon inadequate findings as to the competitive conditions at the Tennessee River ports, as compared to the Ohio and Mississippi River crossings, and that the agency order should be reversed and the case remanded to it for further proceedings.

We believe that the district court's reversal of the Commission on this ground was correct and does not present a substantial question warranting plenary consideration by this Court. However, we are of the opinion that the lower court erred in proceeding to make a factual finding which properly should have been the function, in the first instance, of the Commission, and in failing to remand the case for this and other appropriate agency proceedings. These errors, we suggest, do not require plenary hearing and might be appropriately corrected by modification of the judgment below.

1. The Commission's finding that Southern's proposed rates constituted an "undue or unreasonable preference or advantage" in violation of Section 3(1) rested on three essential elements: (1) a difference in transportation charges made as between certain persons, areas or traffic; (2) injury resulting from this difference; and (3) substantial similarity of transportation conditions so that the different charges are not justified. *Atchison T. & S.F. Ry.* v. *United States,* 218 F. Supp. 359, 363 (N.D. Ill.); *New York* v. *United States,* 331 U.S. 284, 305; *United States* v. *Illinois Central R.R. Co.,* 263 U.S. 515, 524. As to the first two factors, the Commission held, and the court below agreed, that the practical effect of the

$2.40 minimum was to impose a higher per-mile charge from the Tennessee River ports as compared to the Ohio and Mississippi River crossings; and that this higher charge would work to the detriment of handlers and merchandisers of grain located on the Tennessee River. On the third element, the Commission found: "No defense is available to the Southern here by reason of any substantial dissimilarity in transportation conditions as between the origins preferred and those prejudiced. Severe truck competition exists at the Tennessee River ports as well as at the Ohio and Mississippi River crossings" (Arrow J. S. App. 43a). The district court reversed the Commission, because of the inadequacy of this finding and the lack of support for it (Arrow J.S. App. 10a–11a, 12a).

We submit that the Commission's order was properly reversed. While the Commission stated that there was "[s]evere truck competition * * * at" both the allegedly preferred and prejudiced points, it is clear that, as the district court correctly found (Arrow J.S. App. 10a–11a), the truck movements "at" those points were quite dissimilar in nature and in competitive impact. The Commission itself described the nature of the truck movement of grain against which Southern's reduced rates from the Ohio and Mississippi River crossings were directed: "The traffic is transported chiefly by private carriers as a backhaul movement, by buy-and-sell operators who commingle merchandising and transportation activities, and by for-hire carriers of exempt agricultural commodities who haul produce out of the South-

east, principally Florida, and grain as a return load" (Arrow J.S. App. 26a). The low, unpublished rates for this long-distance backhaul fluctuated, in some cases being only the cost of gasoline for the return trip (Arrow J.S. App. 39a, 57a). In contrast, the short-haul carriage of grain from the Tennessee River ports was performed as a two-way operation, by truckers in the business of hauling grain to a destination and returning empty for another load. It was relatively more expensive than the long-haul movement and could be met by railroad rates at a higher per-mile level (Arrow J.S. App. 10a–11a).[1] The $2.40 minimum enabled Southern to maintain its competitive position against this short haul at the same time that it competed with the much cheaper long haul.

Before it may properly evaluate whether the $2.40 minimum is justified by these differences in motor carrier competition, the Commission must recognize the existence of these differences. The failure to do so plainly required reversal. For it was on the basis of its erroneous finding on the similarity of competition that the Commission found undue preference in violation of Section 3(1) (Arrow J. S. App. 40a–44a). And, in turn, the erroneous finding of a Section 3(1) violation was an essential foundation of the Commission's ultimate conclusion that the rates were

[1] This is demonstrated by evidence which indicated average movements of 150 miles from the Tennessee River ports at a charge of $3.00 per ton (Exs. 279, 302, 509; Tr. 12,170, 12,171). The backhaul truck movement of grain into the southeast, Southern found, became a significant factor only at distances of more than 300–350 miles (Tr. 1998–2003; see Tr. 816, 895–896, 933).

unreasonably low. The Commission reasoned that elimination of the discriminatory minimum would lessen the efficient utilization of the jumbo cars (by increasing the proportion of short hauls), thus resulting in upward revision of costs; and it concluded that, in order to make the multiple car rates reasonably compensatory, an increase of 16 percent in the rates to all points would be necessary (Arrow J. S. App. 48a–50a).

To be sure, the Commission also cited two other factors as adversely affecting utilization of the new cars—(a) the competition afforded by competing rail carriers to the southeast, which were to be allowed the same reduced rates in conventional equipment; and (b) a correction in certain items of maintenance expense (Arrow J.S. App. 48–49a). But these various factors were cumulative, not alternative, in the Commission's reasoning (indeed, the Section 3(1) holding appears the most significant). As long as one crucial element of the Commission's report has to be overturned, the order of the Commission cannot stand. Cf. *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 653, 654; *North Carolina* v. *United States*, 325 U.S. 507, 520.[2]

[2] We note that the district court also held that the Commission's reliance upon the factors other than the Section 3(1) violation was erroneous, first, because Southern's estimate of car utilization had already assumed the competition of other roads; and, second, because the ruling on maintenance expenses was not supported by requisite findings (Arrow J.S. App. 12a).

In this memorandum, we take no position on the correctness of the district court's judgment on these points which are much less clear than the Section 3(1) issue, and which in any event appear to have relatively less significant impact upon the rea-

2. Appellants seek to sustain the Commission's finding by explaining that the competition which the Commission found to be similar "at the Tennessee River ports as well as at the Ohio and Mississippi River crossings" (Arrow J.S. App. 43a) was that of long-haul trucking into the southeast from country elevators far beyond the river crossings. The identical motor carrier movement, it is said, satisfies a demand which might otherwise be met by rail from the Ohio and Mississippi crossings or barge-rail traffic through the Tennessee and therefore provides identical competitive conditions for those routes (Arrow J.S. 11–13; I.C.C. J.S. 16).

This defense of the Commission, however, does not accord with the agency's own opinion. The Commission's statement that "[s]evere truck competition exists at the Tennessee River ports as well as at the Ohio and Mississippi River crossings" (Arrow J.S. App. 43a) plainly refers to competition "*at*" those points, *i.e.*, motor carriers offering alternatives for shippers located there, as distinguished from carriers traversing a route touching neither point.[3] Moreover, the

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sonableness of the reduced rates. Since remand is required because of the Section 3(1) issue, the Commission will have an opportunity to reconsider its position on these factors.

[3] Indeed, the Commission's main argument in the court below, contrary to its position here, was that trucking was a factor in moving grain *out* of the Tennessee River ports. Brief for I.C.C., pp. 38–41, 45–46 and Appendix C thereto, pp. 17a–40a; see also Reply Brief for Intervening Defendants, p. 18 and Appendix A thereto, pp. 1–4. Intervening defendants stressed the alternative argument presented in the jurisdictional statements. See Reply Brief for Intervening Defendants, pp. 15–18; see also Brief for I.C.C., pp. 46–48.

Commission went on to say, "It is well settled that a carrier may not pick and choose the competition it will meet if the effect thereof is to create undue preference and prejudice." (Arrow J.S. App. 43a.) In speaking of picking and choosing competition, the Commission evidently was describing the competition afforded by the different truck movements which originate at the preferred points on the one hand and at the prejudiced points on the other. We know of no Commission precedents which indicate that similarity of competitive conditions between prejudiced and preferred points might be shown by reference to competition afforded both points by yet a third route. Introduction of such a novel principle must be supported by reasoning and discussion in the Commission's report, not present here. "The courts may not accept appellate counsels' *post hoc* rationalizations for agency action," *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168.

In any event, petitioners' argument itself demonstrates the inadequacy of the Commission finding on the similarity of competitive conditions. For it represents an alternative (and less plausible) rendering of the Commission's finding, in addition to the one previously discussed, and establishes an inherent ambiguity. See *United States* v. *Chicago, M. & St. P. & P.R. Co.*, 294 U.S. 499, 511.

3. In our view, the district court's reversal of the Commission on the ground described above—the inadequacy of its findings on competitive conditions—does not present a substantial question requiring a plenary hearing in this Court. The court below cor-

rectly applied the standards governing judicial review of the agency order, and the Commission's error is clear.

The district court, however, went beyond this ruling in two respects: (a) it apparently made an independent review of the evidence and held that a Section 3(1) violation could not be found on the present record; and (b) it "permanently suspended, annulled and enjoined" the Commission's order (Arrow J.S. App. 13a–14a), without remanding for further proceedings. We believe that substantial questions are presented by these aspects of the district court decision, although, as indicated below, it may be appropriate to resolve the matter by an order entered on the jurisdictional papers, without plenary hearing.

(*a*) After holding the Commission's findings inadequate to support a Section 3(1) violation, the district court went on to conclude that "transportation conditions, as between the points of origin allegedly unduly preferred and those allegedly unduly prejudiced are *in fact* not similar" (Arrow J.S. App. 12a–13a; emphasis added). In the light of the court's earlier stress upon its own "diligent and painstaking search of the massive record" in support of its conclusions (Arrow J.S. App. 4a), the district court was apparently expressing its independent judgment that on no theory could a Section 3(1) violation be found upon the present record.

Such a holding goes beyond the proper scope of judicial supervision of administrative agencies. The "function of the reviewing court ends when an error of law is laid bare. At that point the matter once

more goes to the Commission for reconsideration.' *Federal Power Commission* v. *Idaho Power Company*, 344 U.S. 17, 20. And upon such reconsideration, the agency must again exercise its special functions. An "administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145. It is improper for a reviewing court to make factual findings or policy determinations in the first instance, for to do so would "intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88.[4]

In the present case, accordingly, it is for the Commission to appraise the appellants' new theory that competition is afforded all intermediate points by the same long-haul trucking (*supra*, pp. 6–7); to decide whether the differences in competitive conditions "at" the various points is sufficient to justify the

[4] See, also, *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 355; *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20.

precise level of the minimum here;[5] and to determine whether additional evidence should be taken.[6]

(*b*) Related to the court's error in entering into essentially administrative questions is its failure to remand the case to the Commission for further proceedings. A reviewing court's decision is binding on the agency only with respect to those issues actually decided on review.[7] After reversal, therefore, the agency is free to make new findings on a new record (*Federal Trade Commission* v. *Ruladam*, 316 U.S. 149, 150–151), or, if the court held only that findings were inadequate, to make new findings on the same record (*United States* v. *U. S. Smelting Co.*, 339 U.S. 186, 189, 198–199). An explicit remand is not required to give the agency such power, which flows from the

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[5] It is well settled that, in determining a Section 3(1) violation, any difference in competitive conditions is a factor to be considered in the first instance by the Commission along with "all the relevant facts and circumstances" (*Barringer & Co.* v. *United States*, 319 U.S. 1, 6–8; *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 592; *United States* v. *Illinois Central Co.*, 263 U.S. 515, 525; *Atchison T. & S.F. Ry.* v. *United States*, 218 F. Supp. 359, 374–375 (N.D. Ill.)).

[6] Further Commission consideration may also be required on the other two factors which the Commission held affected car utilization, the use of the reduced rates by other railroads, and the treatment of car maintenance expenses, see fn. 2, *supra*. On the latter point, the district court held only that the Commission erred in failing to support its conclusion with requisite findings. The court did not find that the record compelled the contrary conclusion as a matter of law, or that the factor was insignificant, as Southern asserts (see Southern Motion to Affirm, p. 21, fn. 14).

[7] *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 140–141, 145; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U.S. 156, 160.

limited scope of judicial supervision and from the agency's authority over its own proceedings.[8]

The prevailing and almost uniform practice of reviewing courts, however, is to remand the case, after reversal, for further agency proceedings.[9] We believe that this practice is eminently desirable for two reasons. *First,* it makes clear that the court is not intruding on the agency's functions but, rather, is limiting itself to the correction of legal error. On remand, as this Court has said, "[t]he whole proceeding thereafter [is] *in fieri*", and, at the conclusion of subsequent agency proceedings, "[w]hen finally decided, all questions [are] still open and could be presented", *United States* v. *U.S. Smelting Co., supra,* at 186, 198–199. See, also, *Cantlay & Tanzola* v. *United States,* 115 F. Supp. 72, 82 (S.D. Cal.). *Second,* a remand removes any doubt about the agency's power to reopen the prior record, and forecloses any contention that an entirely new hearing is required. *Federal Trade Commission* v. *Carter Products, Inc.,* 346

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[8] For such I.C.C. action after reversal without remand, see *Florida* v. *United States,* 282 U.S. 194, 215; *Erie R. Co.* v. *United States,* 64 F. Supp. 162 (S.D. Ohio). See, also, *Thompson* v. *United States,* 20 F. Supp. 827 (E.D. Mo.).

[9] *E.g., National Labor Relations Board* v. *Donnelly Garment Co.,* 330 U.S. 219; *Ford Motor Co.* v. *National Labor Relations Board,* 305 U.S. 364; *Helvering* v. *Rankin,* 295 U.S. 123. See, *Anglo Canadian Shipping Co.* v. *United States,* 264 F. 2d 405, 414–415 (C.A. 9). Examples of remands to the Interstate Commerce Commission after the Court held findings to be inadequate are *American Trucking Assns.* v. *United States,* 364 U.S. 1, 15–16; *Secretary of Agriculture* v. *United States,* 347 U.S. 645.

U.S. 327.[10] In contrast, the entry of a final injunction without remand carries at least some implication that the agency has lost its freedom to proceed upon the existing record. Moreover, while appellee Southern Railway suggests (Southern Motion to Affirm, pp. 25–26) that the Commission may be able to reopen the present proceedings without an order remanding the case, this is not so clear as to foreclose the possibility of litigation on the point.

If, as we urge in points 1 and 2 above, the Court does not consider the merits raised by the jurisdictional statements to warrant plenary consideration, we suggest that the modification of the lower court's order might be accomplished by summary order, without further briefing and argument—the course followed in *Federal Trade Commission* v. *Carter Products, Inc.*, 346 U.S. 327 (fn. 10, *supra*).

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[10] In *Carter*, this Court summarily vacated a judgment setting aside an FTC order, and directed the Court of Appeals to reinstate its judgment after amending it specifically to authorize the Commission to open the proceeding for further evidence and a new order consistent with the Court of Appeals' opinion. The court of appeals had held that the hearing examiner's restriction on Carter's cross-examination of government witnesses denied it a fair hearing and had directed that the Commission order be "set aside" (201 F. 2d 446, 454 (C.A. 9)). The government's petition to this Court argued that the case should have been remanded to permit correction of the error in further proceedings, and it assumed that the court of appeals' order would have required "destruction of a proceeding of some ten years' duration" and an entirely new start (Petition for a Writ of Certiorari in No. 114, O.T. 1953, pp. 14, 19). While a reversal on due process grounds might indeed appear to nullify the entire hearing, a reversal because of inadequate findings—as in this case—would not have that effect. As indicated in the text, however, we believe an explicit remand is to be preferred in all cases to remove any doubt on this point.

CONCLUSION

For the foregoing reasons, we submit that the judgment below should be modified so as (a) to limit the grounds of reversal of the Commission to a holding that the findings were inadequate to sustain the conclusion that Section 3(1) was violated, and hence that the proposed rates were unlawful, and (b) to authorize the Commission to take such further steps as it may deem necessary consistent with the district court's opinion. As so modified, the judgment should be affirmed.

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NOVEMBER 1964.

U.S. GOVERNMENT PRINTING OFFICE 1964